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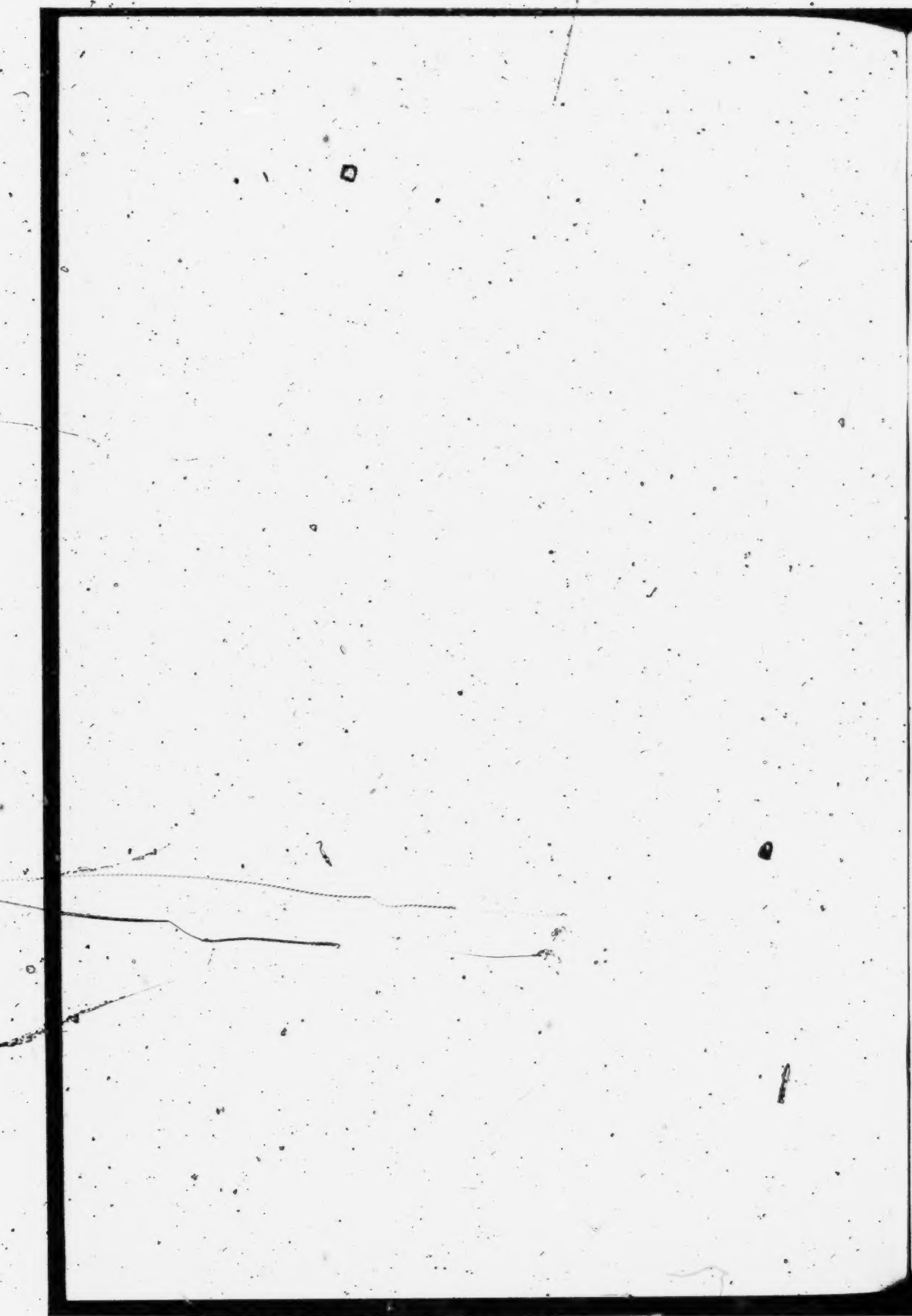

# Supreme Court of the United States

OCTOBER TERM, 1933

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No. 16

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MISSOURI STATE LIFE INSURANCE COMPANY AND HARTFORD ACCIDENT & INDEMNITY CO. ..... *Petitioners,*

v.

MARION JOHNSON ..... *Respondent.*

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## BRIEF FOR PETITIONERS

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### REFERENCE TO OFFICIAL REPORT OF OPINION DELIVERED BY THE LOWER COURT

The opinion of the Supreme Court of Arkansas in the case of *Missouri State Life Insurance Company* v. *Johnson* is reported in 186 Ark. 519, 54 S. W. (2) 407.

### STATEMENT OF GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED

The judgment of the Supreme Court of Arkansas was entered on November 14, 1932 (R. 41). A season-

ably filed petition for rehearing in said court was denied on December 12, 1932 (R. 48). The filing of this petition stayed all proceedings under the judgment as to both Missouri State Life Insurance Company, the defendant, and Hartford Accident & Indemnity Company, the surety on the supersedeas bond. Section 2171 of Crawford & Moses' Digest of the Statutes of Arkansas, among other things, provides that no mandate shall issue and that no decision of the Supreme Court of Arkansas shall "become final until after fifteen judicial days from the time the decision was rendered, unless the court, for good cause shown, shall otherwise direct. If a petition for rehearing be filed before the time for the decision to become final, as above specified, all proceedings upon the decision and mandate therein shall be suspended until petition for rehearing shall be acted upon by the court."

Thereafter, upon application seasonably made on March 10, 1931, by petitioners to Associate Justice Butler of this Honorable Court, an order was signed by the said justice extending the time within which petitioners could apply for a writ of certiorari in this cause for a period of thirty days from said March 10, 1933.

The jurisdiction of this court is invoked under Section 344, Title 28, U. S. Code Annotated (Sec. 237 Judicial Code). On May 8, 1933, this Honorable Court granted a writ of certiorari to review the judgment of the Supreme Court of Arkansas.

## STATEMENT OF CASE

The question in this case is whether an attorney's fee for the plaintiff imposed by state statute should be considered in determining the amount in controversy sufficient to sustain jurisdiction on removal to a federal court.

Section 6155 of Crawford & Moses' Digest provides:

> "In all cases where loss occurs, and the fire, life, health, or accident insurance company liable therefor, shall fail to pay the same within the time specified in the policy, after demand made therefor, such company shall be liable to pay the holder of such policy, in addition to the amount of such loss, twelve per cent. damages upon the amount of such loss, together with all reasonable attorneys' fees for the prosecution and collection of said loss; said attorneys' fee to be taxed by the court where the same is heard on original action, by appeal or otherwise and to be taxed up as a part of the costs therein and collected as other costs are or may be by law collected. Act March 29, 1905, p. 307."

Respondent, a citizen of Arkansas, brought suit against petitioner, a Missouri corporation, on an accident policy for one thousand dollars ($1,000) and a life policy for two thousand dollars ($2,000), making a total of three thousand dollars ($3,000). To avoid removal, the respondent waived the twelve per cent penalty, as prescribed by the statute, but insisted on the attorney's fee (R. 9, 10).

After due notice, petitioner, Missouri State Life Insurance Company, filed a petition for removal on the ground of diversity of citizenship, alleging that a reasonable attorney's fee would not be less than two hundred and fifty dollars ($250), and that such fee was not costs within the meaning of the Removal Act and that the amount in controversy was therefore in excess of three thousand dollars ($3,000) (R. 10-13). A bond in due form was filed (R. 13-15). The trial court denied the petition for removal (R. 15, 16), and awarded an attorney's fee of five hundred and fifty dollars ($550), which was taxed as costs (R. 35). This judgment was affirmed by the Supreme Court of Arkansas and a joint judgment was entered against the petitioners (R. 41).

## SPECIFICATIONS OF ERRORS

The lower court erred in holding that a controversy involving three thousand dollars ($3,000) and a reasonable attorney's fee of not less than two hundred and fifty dollars ($250) was not removable to the federal court.

## ARGUMENT

The original jurisdiction of the district courts of the United States is defined by Section 24 of the Judicial Code as follows:

> "The District Courts shall have original jurisdiction as follows:
>
> "First. Of all suits of a civil nature at common law or in equity * * * where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of three thousand dollars ($3,000), and * * * (b) is between citizens of different states. * * *."

Jurisdiction of the United States district courts on removal is defined in Section 28 of the Judicial Code as follows:

> "Any suit of a civil nature at law or in equity arising under the Constitution or laws of the United States, or treaties made or which shall be made under their authority, of which the district courts of the United States are given original jurisdiction by this title, which may now be pending or which may hereafter be brought in any state court, may be removed by the defendant or the defendants therein to the district court of the United States for the proper district."

The question presented here turns upon the meaning of the word "costs" as used in the clause "where the matter in controversy exceeds, exclusive of interest and costs, the sum of three thousand dollars ($3,000)." It seems to us that the question has already been answered by this court in the case of *People*

*of Sioux County, Nebraska,* v. *National Surety Company,* 276 U. S. 238. In that case the respondent had executed a bond in the amount of $30,000 to protect deposits made by Sioux County in the First National Bank of Harrison. The bank became insolvent, and at the time it closed its doors it held county deposits amounting to $35,395.70. Suit was instituted in the state court to recover the penal amount of the bond and a reasonable attorney's fee. The proceeding was removed to the United States District Court, by reason of the amount involved and diversity of citizenship. The district court rendered judgment for the full amount of the bond and assessed an attorney's fee of $3,000. The Circuit Court of Appeals, Eighth Circuit, reversed the judgment allowing the attorney's fee, and limited recovery on the bond to $25,000. The theory prompting this reduction was that the statute of Nebraska operated to limit the liability of the surety to one-half of the authorized capital stock of the bank which acted as depository. Before the proceeding reached this court, the construction of the Nebraska statute had been settled by a decision of the supreme court of that state. Following that decision, this court held that Sioux County was entitled to recover the full amount of the bond. The Circuit Court of Appeals had disallowed the attorney's fee because the state statute authorizing the allowance provided that it should be taxed as costs, and that such statute could be applied only in the state courts, because under the provisions of the Revised Statutes (823, 824) such an al-

lowance could not be taxed as costs. In holding that this theory was erroneous, this court said:

> "In striking down so much of the judgment as allowed an attorney's fee the court below was persuaded that Sec. 7811, which provides for an attorney's fee, authorized it only as costs to be taxed in the state court. As costs in the federal courts are regulated exclusively by R. S. Secs. 823 and 824, the court concluded that other costs, authorized only by a state statute, could not be included in the judgment. See *United States* v. *Sanborn*, 135 U. S. 271, 282; *The Baltimore*, 8 Wall. 377, 388, *et seq.*; compare *Ex Parte Peterson*, 253 U. S. 300, 314-319.
>
> "Both in an earlier case, *Globe Indemnity Co.* v. *Sulpho-Saline Bath Co.*, 299 Fed. 219, certiorari denied 266 U. S. 606; see also *Spring Garden Insurance Co.* v. *Amusement Syndicate Co.*, 178 Fed. 519, and in a later case, *Business Men's Assurance Co.* v. *Campbell*, 18 Fed. (2d) 223, the same court applied the Nebraska statute allowing the recovery of attorneys' fees in suits upon insurance policies. When it was argued that no other costs can be taxed in a court of the United States than those authorized by federal statute, the Court of Appeals said in the latter case (p. 224) that the objection 'applies only to ordinary costs, and not to allowances for attorneys' services provided by state statutes.'
>
> "State statutes allowing the recovery of attorneys' fees in special classes of actions have been upheld as constitutional by this court, *Farmers' & Merchants' Insurance Co.* v. *Dobney*, 189 U. S. 301; *Missouri, Kansas & Texas Ry.* v. *Harris*, 234 U. S. 412; *Chicago & Northwestern Ry.* v. *Nye Schneider Fowler Co.*, 260 U. S. 35; *Fidelity*

*Mutual Life Ass'n* v. *Mettler,* 185 U. S. 308, and they have been given effect in suits brought in the federal courts. *Fidelity Mutual Life Ass'n* v. *Mettler, supra; Iowa Life Insurance Co.* v. *Lewis,* 187 U. S. 335; *Home Life Insurance Co.* v. *Fisher,* 188 U. S. 726; *Hartford Fire Insurance Co.* v. *Wilson & Tcomer Fertilizer Co.,* 4 Fed. (2d) 835, certiorari denied 268 U. S. 704.

"In these cases the local statutes were in effect treated as creating a statutory liability in which insurers, by accepting risks after their enactment, had acquiesced, and for the liability thus assumed a remedy was available in the federal as well as in the state courts. *Fidelity Mutual Life Ass'n* v. *Mettler, supra,* at 326.

"The present statute, printed in the margin, provides that in the cases specified the court 'shall allow the plaintiff a reasonable sum as an attorney's fee in addition to the amount of his recovery, to be taxed as a part of the costs.' The direction that the added liability be included in the judgment as costs does no more in substance than the provision upheld and applied in the *Mettler* case, that the insurance company 'shall be liable to pay * * * all reasonable attorney's fees' or the provision upheld and applied in *Home Life Insurance Co.* v. *Fisher, supra,* that the attorneys' fees should be added to the judgment.

"Such doubt as there may be as to the meaning and effect of the statute arises from certain decisions of the Supreme Court of Nebraska enforcing it in suits upon insurance contracts entered into before its enactment, in which the statute, attacked as impairing the obligation of the contract, was characterized as 'remedial' or as a 'costs' statute. *Nye-Schneider-Fowler Co.* v. *Bridges,*

*Hoye & Co.*, 98 Neb. 27; Id., 863; *Ward* v. *Bankers' Life Co.*, 99 Neb. 812; *Reed* v. *American Boulding Co.*, 102 Neb. 113. In *Nye-Schneider-Fowler Co.* v. *Bridges, Hoye & Co., supra,* the Supreme Court of Nebraska said (p. 867):

"'If the question that we are considering was now presented for the first time, we would hesitate to say that this statute does not create and add to the contract a legal liability which would not exist under the contract prior to the enactment of this statute. The fact that the attorney's fee is to be taxed as costs in the case is not of itself decisive of the question.'

"But the question before the Nebraska court in the cases cited was not that with which we are now concerned. Whether this liability for an attorney's fee, assumed by entering into an insurance contract after the enactment of the statute providing for the liability, may be enforced in the federal courts does not depend on any nice distinctions which may be taken between the right created and the remedy given. Disregarding mere matters of form it is clear that it is the policy of the state to allow plaintiffs to recover an attorney's fee in certain cases, and it has made that policy effective by making the allowance of the fee mandatory on its courts in those cases. It would be at least anomalous if this policy could be thwarted and the right so plainly given destroyed by removal of the cause to the federal courts.

"That the statute directs the allowance, which is made to plaintiff, to be added to the judgment as costs are added does not make it costs in the ordinary sense of the traditional, arbitrary and small fees of court officers, attorneys' docket fees and the like, allowed to counsel by R. S. Secs. 823, 824.

> "The present allowance, since it is not costs in the ordinary sense, is not within the field of costs legislation covered by R. S. Secs. 823, 824. That the particular mode of enforcing the right provided by the state statute, *i.e.*, by taxing the allowance as costs—is not available to the federal courts under R. S. Secs. 823, 824 does not preclude the recovery. Since the right exists the federal courts may follow their own appropriate procedure for its enforcement by including the amount of the fee in the judgment. R. S. Sec. 914. Compare *Mexican Central Ry.* v. *Pinkney*, 149 U. S. 194; *Indianapolis & St. Louis R. R.* v. *Horst*, 93 U. S. 291; *Manitowoc Malting Co.* v. *Feuchtwanger*, 196 Fed. 506; *Boatmen's Bank* v. *Trower Bros. Co.*, 181 Fed. 804."

The language of the Nebraska statute which was quoted in the margin is substantially the same as that contained in Section 6155 of Crawford & Moses' Digest of the Statutes of Arkansas. Both provide that the attorney's fee which is allowed by the court shall be "taxed as costs."

In referring to the cases where the constitutionality of attorney's fee statutes had been upheld, this court said:

> "In these cases the local statutes were in effect treated as creating a statutory liability in which insurers, by accepting risks after their enactment, had acquiesced."

Such is the construction given Section 6155 of Crawford & Moses' Digest by the Supreme Court of Arkansas. In the case of *Vaughan* v. *Humphreys*, 153 Ark. 140, 239 S. W. 730, the court said:

"The attorney's fee is a penalty given to reimburse the policyholder for expenses incurred in enforcing the contract of indebtedness, and is taxed as costs in the case. *Arkansas Ins. Co.* v. *McManus,* 86 Ark. 115, and *Mutual Life Ins. Co.* v. *Owen;* 111 Ark. 554. Hence the attorney's fee is part of the recovery of the policyholder against the insurance company."

In *American Liberty Mutual Insurance Company* v. *Washington,* 183 Ark. 497, 36 S. W. (2d) 963, in speaking of this statute, the court said:

"The statute becomes a part of the contract of insurance."

There are Arkansas statutes which authorize the assessment of attorneys' fees in certain proceedings against railroad companies where police regulations have been violated. In *Kansas City Southern Railway Company* v. *Marx,* 72 Ark. 357, 80 S. W. 579, we find this statement:

"Statutes allowing attorney's fees to be taxed against railway companies where judgments are recovered against them for the violation of statutory regulations are upheld on the ground that *such a fee is in the nature of a penalty* imposed upon the company for failure to comply with the police regulations of the state."

In *St. Louis-Southwestern Railway Company* v. *Knight,* 81 Ark. 429, 99 S. W. 684, the court said:

"In *Kansas City So. Ry. Co.* v. *Marx,* 72 Ark. 357, we said that the Legislature could not discriminate against railroad companies and tax them with attorney's fees when other litigants were not

subjected to such liabilities, but that they could authorize them to be taxed with attorney's fees in judgment against them for violating statutory regulations, *the fee in such a case being a part of the penalty* for violating the statute."

Section 6155 of Crawford & Moses' Digest is to be applied in all cases. In an equitable proceeding resulting in a judgment against an insurer on a policy, the lower court declined to assess an attorney's fee. On appeal, the Supreme court in its opinion, in the case of *Bankers' Reserve Life* v. *Crowley,* 171 Ark. 135, 284 S. W. 4, said:

"Upon the cross-appeal we think the chancellor was wrong in not allowing twelve per cent. damages, together with a reasonable attorney's fee for the prosecution and collection of the loss, as provided in Sec. 6155 of Crawford & Moses' Digest. It is true, as held in *Federal Union Surety Co.* v. *Flemister,* 95 Ark. 389, that no recovery could be had under this statute in the application of the general rule that a chancery court will not enforce penalties except under very peculiar circumstances, which were not presented in that case. There a suit was instituted in behalf of policyholders for the appointment of an ancillary receiver to take charge of the assets of an insurance company in this State, on the ground that a general receiver had been appointed in the State of Nebraska to take charge of the assets of the company and to wind up its affairs on the ground of insolvency. All parties having claims voluntarily submitted themselves to the jurisdiction of the chancery court, and the liability of the Federal Union Surety Company as surety on the bond of the insurance company was treated by the parties

and by the chancery court as an asset of the insurance company in this State. There the main purpose of the suit was the appointment of the ancillary receiver to aid in winding up the affairs of the insurance company in the chancery court, and the filing of the claims was but an incident to the main suit.

"In the case at bar the suit was commenced in equity by the insurance company to cancel a policy of life insurance after the death of the insured on the ground of fraudulent misrepresentation on the part of the insured in the procurement of the insurance, and a cross-bill was filed by the administrator of the estate of the deceased policyholder to recover the amount of the insurance provided in the policy. There was a recovery for the full amount of the policy.

"The twelve per cent. allowed by the statute is given as damages for failure to comply with the contract of payment, and the attorney's fee is allowed as compensation for the cost of collecting the debt. *Mutual Life Ins. Co.* v. *Owen*, 111 Ark. 554.

"It is settled by our previous cases that contracts of insurance, from their very nature, are susceptible of classification apart from other contracts, and, under ordinary circumstances, the damages and attorney's fees are as collectible in a chancery court as in any other court."

In the case of *Mutual Life Insurance Company* v. *Marsh*, 185 Ark. 332, 47 S. W. (2d) 585, the Supreme Court of Arkansas held that a claim of $3,000 plus the 12 per cent. penalty which is provided for by Section 6155 of Crawford & Moses' Digest, is a controversy which is removable. This is from the opinion:

> "The amount in controversy in an action on an insurance policy for $3,000 plus 12 per cent. penalty is $3,360, which entitled the defendant, a nonresident, to removal of the cause to the Federal Court, under tit. 28, Sec. 71, USCA."

We can see no magic in the formula "to be taxed as costs" which can change what is clearly a penalty into something else. In the petition for removal it was alleged that a reasonable attorney's fee on a recovery of $3,000 would be at least $250 (R. 11). In fact, the trial court assessed a fee of $550 (R. 35). The Supreme Court of Arkansas has held that ordinarily a fee of ten per cent. is appropriate, but where there are exceptional difficulties an allowance of fifteen per cent. is proper. The following quotation is taken from the case of *Missouri State Life* v. *Fodrea,* 185 Ark. 155, 46 S. W. (2d) 638:

> "The rule has been to allow about 10 per cent. of the amount of the recovery, but here there appears to have been considerable work done in the preparation and trial of the cases and we have reached the conclusion that 15 per cent. of the recovery, or $300 in each case, will be reasonable compensation."

We are less concerned with the meaning of the Arkansas statute than we are with the meaning of the clause "where the matter in controversy exceeds $3,000, exclusive of interest and costs" as used in Section 24 of the Judicial Code. It seems to us that the word "costs" was used in its ordinary sense, and that Congress intended to fix a definite test for determining

removability. It is hardly possible that the word was used as a variable, to mean one thing in one case and something else in another. It is hardly possible that Congress could ever have intended to let removability rest upon a mere definition as given by a state statute to a substantial part of the claim. In *Sioux County* v. *National Surety Company, supra,* this court said:

> "That the statute directs the allowance, which is made to plaintiff, to be added to the judgment as costs are added does not make it costs in the ordinary sense of the traditional, arbitrary and small fees of court officers, attorneys' docket fees, and the like, allowed to counsel by R. S., paragraphs 823 and 824. The present allowance, since it is not costs in the ordinary sense, is not within the field of costs legislation covered by R. S., Secs. 823, 824."

If a substantial attorney's fee allowed under a state statute is not "costs" in the ordinary sense, as the word is used in the Revised Statutes, then why should it be called "costs" under the removal act? The word "costs" wherever used in Federal legislation has meant costs in the ordinary sense, such as the traditional, arbitrary and small fees of officers, attorneys' docket fees, and the like. Section 968 of the Revised Statutes povides that a plaintiff recovering less than $500 may be adjudged to pay the "costs." Section 969 of the Revised Statutes provides that in certain cases the United States, in internal revenue suits, shall not be subject to "any costs." Section 970 of the Revised Statutes provides that in certain instances claim-

ants of any property seized by the United States shall not be entitled to "costs." Under Section 971 of the Revised Statutes the plaintiff, if non-suited in certain proceedings, shall be liable for "double costs." Section 972 of the Revised Statutes provides that in copyright suits "full costs" shall be allowed. Section 974 of the Revised Statutes provides that in prosecution for fine or forfeiture the defendant shall be "subject to the payment of costs." Section 975 of the Revised Statutes provides that in certain proceedings under penal statutes the court shall "award the defendant his costs." Section 977 of the Revised Statutes provides that where an action is unnecessarily divided into several actions, the party shall not "recover the costs of more than one action or process." Section 982 of the Revised Statutes provides that if an attorney appears to have multiplied the proceedings he shall be "required to satisfy any excess of costs so increased." Section 983 of the Revised Statutes provides that the fees of the clerk, marshal, attorneys, printers, witnesses and lawful fees for exemplifications of papers used at the trial, where "costs" are recovered by the prevailing party, shall be taxed by the clerk or judge in his favor. Nowhere is the word "costs" used in these provisions as covering a substantial allowance to an attorney which is part of the recovery. It is quite obvious that the word "costs," as used in Section 24 of the Judicial Code (R. S. 563, 629) was used in the same sense that the word was employed in other sections of the Revised Statutes, meaning the "traditional, arbitrary and small fees of court officers, attorneys' docket fees" and the like.

This court takes judicial notice of the laws of all the states, and it knows that these state statutes allowing attorneys' fees against corporations as a penalty for delay in paying claims are of comparatively modern origin. No such acts were in existence when the word "costs" was first used in defining federal jurisdiction, and such statutes and the substantial allowances thereunder could not have been in the mind of Congress when it excluded "costs" from the amount involved.

The case of *Swofford* v. *Cornucopia Mines of Oregon,* Circuit Court, Oregon, 140 Fed. 957, decided in 1905, holds that an attorney's fee cannot be included in making up the jurisdictional amount for removal. On a motion to remand the court said:

> "The complaint is brought to enforce a miner's lien under section 5668, B. & C. Comp. Or. The plaintiff alleges that he has perfected two such liens for work done upon the Cornucopia Mines of Oregon, the aggregate of which is $1,905.50. He claims in addition thereto attorney's fees in the amount of $750 under section 5672, B. & C. Comp. Or., which contains the following provision:
>
> " 'In all suits under this act the court shall, upon entering judgment for the plaintiff, allow as part of the costs all moneys paid for the filing and recording of the lien and also a reasonable amount as attorney's fees.'
>
> "The question presented is whether the attorney's fee so provided for as costs may be added to the amount of the liens, so as to create the amount in controversy which is necessary to give this court jurisdiction. The defendants cite and

rely upon *Rogers* v. *Riley,* (C. C.) 80 Fed. 759, in which it was held that where by express stipulation, valid in the state where made, a debtor becomes liable for reasonable attorney's fees in case the debt is collected by suit, such fee is not a part of the costs which are excluded under the judiciary act, but may be added to the amount of the debt for the purpose of making up the jurisdictional amount. This was held expressly upon the ground that the obligation to pay a reasonable attorney's fee was a contractual one, and was an existing liability at the date of bringing the suit. But in the present case there was no such contractual liability to pay attorney's fees. The corporation for which the work was done had not promised to pay attorney's fees. The obligation is purely statutory, and is declared by the statute to be allowable upon entering a judgment for the lien claimant as a part of the costs. In 11 Cyc. 105, it is said:

"'In jurisdictions where stipulations for the payment of attorney's fees are considered valid, these fees are taxable as costs.'

"This is especially true in jurisdictions where by statute it is declared that attorney's fees shall be treated as part of the costs, notwithstanding that the obligation to pay them may rest in the contract of the parties. *Spiesberger Bros.* v. *Thomas,* 59 Iowa 606, 13 N. W. 745. The amount in controversy in the present suit is therefore the sum of the liens, exclusive of attorney's fees, and is not sufficient to sustain the jurisdiction of the court."

Likewise, *Peters* v. *Queen Insurance Company of America,* Circuit Court of Georgia, 182 Fed. 113, decided in 1910, is opposed to the contention that an at-

torney's fee is to be considered in determining the amount in controversy. In remanding the case to the state court, the district judge said:

> "The jurisdiction of this court does not obtain in any case of this character, unless the amount involved exceeds the sum of $2,000, exclusive of interest and costs. Plaintiff's claim is made up of three items: (1) Loss under the policy in the amount of $1,500; (2) 25 per cent. thereon, amounting to $375, as a penalty under section 2140 of the Civil Code of Georgia of 1895; and (3) 25 per cent. thereof as attorney's fees, amounting also to $375, under the same section of the Code.
>
> "A motion to remand the case has been made, was argued orally and by brief, and the court has taken time for advisement. It is quite evident that, in order to confer jurisdiction, both the penalty and the attorney's fees claimed must be considered as included in the amount in controversy. If either item is omitted, the plaintiff's claim is only for $1,875.
>
> "Section 2140 of the Code of Georgia of 1895 provides:
>
> " 'The several insurance companies of this state, and foreign insurance companies doing business in this state, in all cases when a loss occurs, and they refuse to pay the same within sixty days after a demand shall have been made by the holder of the policy on which said loss occurred, shall be liable to pay the holder of said policy, in addition to the loss, not more than 25 per cent. on the liability of said company for said loss; also, all reasonable attorney's fees for the prosecution of the case against said company, provided it shall be made to appear to the jury trying the same that the

refusal of the company to pay said loss was in bad faith.'

"It is not deemed essential to state the views of the court upon the question whether or not the penalty made possible by the statute is a part of the principal amount involved. It seems the question may be determined upon the inquiry: Does the language of the Code allowing reasonable attorney's fees in the section above quoted, viz., 'all reasonable attorney's fees for the prosecution of the case,' provide for the recovery of such amount as costs or damages?

"It is insisted that, since costs were unknown to the common law, only such items as are defined by the statute of the state (section 5394 of the Civil Code of 1895) should be regarded as costs. This section relates exclusively to the costs of witnesses, of the clerk of court, of the justice of the peace, the sheriff, etc., and has no express reference to fees of attorneys. It is, however, true that the word 'costs' has been judicially defined by the Supreme Court of the state as follows:

"'The term "costs" has, as applied to proceedings in a court of justice, as in the acceptation of the profession and by the practice of all courts in Georgia, a well-understood meaning. It includes all charges fixed by statute, as compensation for services rendered by officers of the court in the progress of the cause. It does not embrace fees, to which counsel prosecuting or defending may be entitled by contract, express or implied, between them and their clients.' *Davis* v. *State*, 33 Ga. 533; *Markham* v. *Ross*, 73 Ga. 105.

"Accepting these deliverances of the state Supreme Court as conclusive, it appears that fees

of counsel for their services under contract, express or implied, may not be treated as costs; and, since this item of attorney's fees does not arise from contract, express or implied, but is allowed by statute, the inquiry seems inevitable, must it not be treated as costs? It is true that the amount is not definitely fixed by the statute, and the jury is permitted to fix it. It must be 'reasonable,' and is therefore under the control of the court. It is not a certain item of costs, but '*id certum est quod certum reddi potest.*' And since the amount claimed is not for the honorarium of counsel, it is for the reasonable fees of attorneys, and, like the docket fee of the attorney allowed by the practice of the United States court, the finding of the jury in this respect, if allowable at all, it would seem just be treated as costs."

A different conclusion is reached in the later case of *Conner* v. *Connecticut Fire Insurance Company*, District Court of Florida, 292 Fed. 767, decided 1923. The statute involved did not provide that the attorney's fee should be taxed as costs. The district judge called attention to this distinction, and then said:

"The statute of Florida provides that there shall be adjudged against the insurer, and in favor of the insured, a reasonable sum as fees for his attorney prosecuting the suit, and further provides for the fixing of this sum by the court or jury upon testimony. Such being the statute of this state, I must view the attorney's fee provided by the statute as a penalty, and not as costs, to be taxed at the termination of the case, and, being a penalty, it may be considered in arriving at the jurisdictional amount in controversy in the case."

The case of *Rogers* v. *Riley*, 80 Fed. 759, involved a note for $2,000, with a provision for the payment of an attorney's fee as an expense of collection. In holding that such fee should be included as part of the amount in controversy, the court said:

> "And it is alleged in the bill that 10 per cent. on the amount sued by the mortgagee would be a reasonable attorney's fee in the case, and the prayer of the bill is that a sale of said property be made to pay said mortgage debt, together with 10 per cent. thereon, as complainant's attorney's fee. The act of 1887-88 gives this court 'concurrent jurisdiction with the several courts of suits of a civil nature at common law and equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of $2,000'; and the inquiry here is whether or not this attorney's fee which is thus contracted for in this mortgage is to be considered as costs, within the meaning of the act, or should it be calculated as a liability, in estimating the amount in controversy? The acts of Congress allow an attorney's fee, which in a case like this is $20, and provide, also, that the fees of the clerk, marshal, and attorney shall be taxed by the judge or the clerk of the court, and be included in, and recorded as part of, the judgment or decree against the losing party. See Rev. St. Sections 824, 983. This, being a contractual obligation to pay the association a reasonable attorney's fee, is not, we think, in any sense, costs, as mentioned in the act of 1887-88, but is a liability which should be included in estimating the amount in controversy."

As pointed out in the above quotation, the only attorney's fee which could come within the definition of

"costs" as used in the act conferring jurisdiction on the district courts, are such fees as may be allowed under Revised Statutes, Section 824. The fee allowed in this instance is not imposed by authority of any statute of the United States dealing with costs. It is imposed by a state statute which provides that "in all cases where loss occurs * * * such company shall be liable to pay the holder of such policy, in addition to the amount of the loss, 12 per cent. damages, together with all reasonable attorney's fees." There can be no distinction between the obligation created by this statute and that which was created by the contract before the court in the Rogers case, *supra*.

In the recent case of *Des Moines Elevator & Grain Company* v. *Underwriters' Grain Association* (C. C. A. 8th) 63 Fed. (2d) 103, suit was instituted in the state court of Iowa against one hundred and twelve insurers who had issued open policies of insurance to attorneys in fact, and the attorneys in fact had issued their certificates to the insured as evidence of coverage. The certificates were in identical language and recited that the defendants "each for itself and not one for another" insured the risk. Two of the defendants removed to the federal court on the ground of separable controversy. It was suggested that inasmuch as the statutes of Iowa permitted a single suit against all of the defendants, this would prevent a removal to the federal court. Judge Sanborn, in delivering the opinion of the court, said:

"While the liability of each of the insurers here arises out of the same undertaking, that liability is separate and distinct from the liability of any other insurer, and the happening of the contingency insured against, instead of giving rise to a single cause of action against all of the insurers, gives rise to 112 separate causes of action, which, under the Iowa statute, may be united in one action. The loss is not the cause of action, but the happening of the loss gives rise to a separate cause of action against each insurer. Had the plaintiff sued separately each of the removing defendants in the state court, as it might have done, the suits could have been removed to the federal court. The fact that, under the state statute, the plaintiff had the right to combine the causes of action in a single suit could not affect the right granted to the defendants by the laws of the United States to remove the controversy to the federal court.

"In the case of *Harrison* v. *St. L. & San Francisco R. Co.*, 232 U. S. 318, 329, 34 S. Ct. 333, 335, 58 L. Ed. 621, L. R. A. 1915F, 1187, the court said: 'In the second place, as the right given to remove by the United States law is paramount, it results that it is also of the essence of the right to remove, that when an issue of whether a prayer for removal was rightfully asked arises, a Federal question results which is determinable by the courts of the United States free from limitation or interference arising from an exertion of state power.'"

If the right to remove under the federal statute cannot be defeated by a state statute which permits one suit against numerous defendants who are severally liable just as if they were jointly liable, then a state statute cannot prevent removal where the amount in

controversy exceeds $3,000, although it labels a substantial part of the amount in controversy as "costs."

Under the decision in *Sioux County* v. *National Surety Company, supra,* suit could be maintained in the district court of the United States between citizens of different states where the plaintiff sued for $3,000 and a reasonable attorney's fee. Under this decision, the district court could render judgment for a reasonable attorney's fee, although it could not tax it as "costs." In substance, the attorney's fee allowance is part of the recovery. If the district court of the United States would have jurisdiction of a suit originally filed therein, then it follows that it would have jurisdiction of a similar case on removal.

We submit that no state statute or the interpretation thereof can change the meaning of the word "costs" as used in the act which defines the jurisdiction of the federal district courts.

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